No. 3955

United States

Circuit Court of Appeals

For the Ninth Circuit

G. TRAVERSI,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

PETITION FOR REHEARING.

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In the

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G. TRAVERSI,

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To the Honorable the United States Circuit Court of Appeals for the Ninth Circuit.

Plaintiff in error respectfully petitions this honorable court to vacate the decision heretofore rendered and to grant him a re-hearing herein.

As stated by this court the evidence of the defendant's guilt of the offense charged in the first count of the information was "meagre," and the question whether or not plaintiff in error was bringing in the wine in question for his luncheon was one for the *jury* to determine.

This being so, then, certainly, plaintiff in error was at least entitled to his constitutional right to have the jury pass upon *all* the evidence that might

throw any light upon the subject; but here, *that* right was, by the instructions of the trial court, *taken from him.*

The portion of the instructions which plaintiff in error submits has this effect (Tr. p. 35) reads as follows:

> "It is true, as the United States Attorney suggests, that it is not necessary under this Act that it be shown that any positive sale or dispensation of liquor was going on at the time, provided it is shown that there was liquor maintained on the premises. Section 33 of the Act provides 'After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of, in violation of the provisions of this title.' In other words, where liquor is found upon premises that are not of the character of those described in the Act as being such that people are entitled to keep liquor there, then that very fact raises the presumption and is *prima facie* evidence that it was there for an illegal purpose under the law. As I say, the only place where liquor is permitted to be maintained under the Prohibiton Act is in one's private residence, premises devoted solely to the occupation and use

as such. It is true that where one lives at a hotel or lives in a flat, or lives in apartments, exclusively devoted to the purpose of residence, he may keep and maintain liquors in those premises so occupied by him, but he is not at liberty to carry it out of those premises or take it out for the purpose of going somewhere else and enjoy it with his meals. The purpose of the law is to suppress the public consumption and maintenance of liquors that are prohibited under this Act so that the law shall not be subject to any *pretense* that it is being used under such circumstances *solely for the use of the parties.* If the defendant Traversi is testifying *truthfully* that he was taking it with him to some place where he was going to have his lunch he would be *violating the law,* because if he maintained it in his private residence he would be entitled to have it there and serve his family there, but not permitted to take it off those premises."

After informing the jury of the rule of evidence that the illegal possession of intoxicating liquor is *prima facie* evidence that such liquor is kept for the purpose of being sold, etc., the Court, by this instruction, tells them that the purpose of the law is to suppress the public consumption and maintenance of liquor so that the law shall not be subject to any *pretense* that it is being used for a purpose *other*

than that of being sold, bartered, exchanged, given away, furnished or otherwise illegally disposed of, and continues that even though plaintiff in error testified *truthfully* that he intended consuming the wine himself for his lunch, still he would be violating the law, and that, therefore, the jury could not consider *that* fact in arriving at a verdict, because of the *prima facie* rule of evidence, and of the presumption, that intoxicating liquor possessed illegally was kept for the purpose of its being sold, etc. In other words, the jury was thereby instructed that if they should find that plaintiff in error was in the possession of the liquor at a place prohibited under the law, then it was their duty to convict him of the offense of keeping said liquor at such place for sale, notwithstanding they might believe that he had no intention of selling it, but that his only purpose of having it was to drink it himself; thus taking *from* the jury a question which this court says "was clearly" for that body.

Plaintiff in error further respectfully submits that the record shows that *this* instruction was not one of those, as stated by this court, "with which the parties were satisfied at the time they were given." The answer "no," given by the attorney for plaintiff in error to the question of the court: "Is there anything else that counsel would like to ask?" was so given prior to the time that the court gave the instruction complained of, and referred

solely to those instructions that had theretofore been given. (See Transcript p. 35.)

Surely, therefore, an injustice *has* been done to plaintiff in error, if the jury *was* instructed that they could not consider the testimony of plaintiff in error that he intended consuming the liquor with his lunch, in arriving at a verdict.

The following instruction was also given *subsequent* to the time that plaintiff in error, by his attorney, in answer to the court's question, stated that he did not desire to ask anything else, (See p. 37 transcript). "You are entitled to draw reasonable deduction from the evidence that is before you and determine whether if liquor was brought there at one time in an illegal way, it was not brought there *for the same purpose* on *other* occasions. It is a *question* of *fact* for you."

As there was absolutely *no* evidence that any intoxicating liquor had *ever* been brought to the premises at any other time, or that on any *other* occasion any intoxicating liquor had been on such premises, the jury, by this instruction, was informed that they might consider a fact *not in evidence*.

There *could* be no greater injustice done to a defendant in a criminal action than to permit a jury to take into consideration any fact or circumstance *not in evidence*, and regarding which no testimony whatever had been introduced.

It is intimated by the concurring opinion of the distinguished Circuit Judge that this court should

refuse to consider the evidence because no exceptions had been taken. Plaintiff in error respectfully submits that a refusal to do so in the case at bar would, to use the language of this court in *Bilboa v. United States,* "operate as a miscarriage of justice" and would amount to "a judicial wrong," and that a *consideration,* at least, of the evidence and of the instructions is not only proper, but necessary, for the purpose of enabling this court to *determine* whether or not such miscarriage of justice has occurred or such judicial wrong exists.

Respectfully submitted,

R. PLATNAUER,

Attorney for Plaintiff in Error.

I, R. Platnauer the attorney for the Plaintiff in Error in the above entitled action, do hereby certify that, in my opinion, the foregoing petition for a rehearing is well founded, and I do further certify that said petition is not interposed for delay.

R. Platnauer

Attorney for Plaintiff in Error.